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In the

Supreme Court of the United States

JANUARY TERM 1967

No. 1127

SOUTHERN BROKERAGE COMPANY,
Petitioner,

v.

DAVID CANNARSA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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In the

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No. .....

SOUTHERN BROKERAGE COMPANY,

Petitioner,

v.

DAVID CANNARSA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas, and the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, and the 134th Judicial District Court of Dallas County, Texas.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas is unreported. Its order refusing the application for writ of error to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas is set forth in Appendix B at page 11. Its order refusing Motion for Rehearing is set out at page 11 of Appendix B. The Court of Civil Appeals opinion is reported in 405 S.W. 2d 457. It is set forth in Appendix B hereto beginning at page 1.

JURISDICTION

The Petitioner's Application for Writ of Error to the Court of Civil Appeals for the Sixth Supreme Judicial District was refused by the Supreme Court of the State of Texas on October 12, 1966 (R. 11). The Supreme Court of the State of Texas denied Petitioner's Motion for Rehearing on November 9, 1966 (R. 11). An extension of time within which to file this Petition for Writ of Certiorari until and including March 7, 1967 was granted by this Court. The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, U.S.C.A.

QUESTION PRESENTED

The question presented is whether or not the Courts below have erroneously required the performance of a contract, the performance of which would violate an injunction of a United States District Court, the Securities Act of 1934, and the Rules and Regulations of the Securities and Exchange Commission.

STATUTES INVOLVED

The statutory provisions involved are Section 78j of the Securities Exchange Act of 1934 (15 U.S.C.A. 78j), Section 78i of the Securities Exchange Act of 1934 (15 U.S.C.A. 78i), Section 10(b)-5 of the Securities Exchange Act of 1934 (17 C.F.R. §240:10b-5), and Section 29(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. 78cc). They are printed in Appendix A, infra, pp. 1, 2, and 3.

STATEMENT OF THE CASE

This is a suit for breach of contract for the purchase of stock of Jerome Richards & Co. Petitioner refused to complete the purchase from Respondent after it was learned that the Securities Exchange Commission was investigating the affairs of one Kamen & Company in its dealings with said stock (S.F. 52, 53, 68, 69, 158, 159). Kamen & Company had instructed the Respondent to purchase 700 shares of Jerome Richards & Co., Inc. stock at one price from one firm (Frederick Cirlin & Associates) and sell it to Petitioner at a slightly higher price, simultaneously instructing Petitioner to sell it to a third party at a still higher price (S.F. 19, 82, 83, 100, 116). After Petitioner and Respondent discovered that the Commission was investigating Kamen & Company in its dealings with said stock and that the party to whom the Petitioner was to sell the stock was nonexistent, it refused to honor its confirmation to purchase the stock (S.F. 52, 53, 55, 57, 73, 74, 116, 121). A subsequent United States District Court action was immediately instituted by the Securities Exchange Commission naming

Kamen & Company as one of the defendants and citing certain manipulative devices with respect to its trading of the stock in question. A subsequent injunction was issued to the knowledge of both Petitioner and Respondent (S.F. 67, 68). The Court of Civil Appeals opinion accurately states the sequence of events with respect to the trading of this stock (Appendix B; pp. 2-5). Subsequent to Petitioner's Application for Writ of Error filed in the Supreme Court of the State of Texas, disciplinary action was taken against Kamen & Company and Frederick Cirlin and Associates (Securities Exchange Act Release No. 7965). This fact was not in evidence at the time of the trial of this cause, but was brought to the attention of the Supreme Court of the State of Texas, in its Motion for Rehearing. (p. 2).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below effects the enforcement of an illegal transaction in violation of an injunction issued by a United States District Court, thus putting Petitioner in jeopardy of punishment of contempt of court and furthering a fraudulent scheme condemned by Federal authorities who had exclusive jurisdiction.

2. The decision of the court below discounts the uncontradicted evidence that such a transaction was fraudulent or was for the purpose of creating a false and misleading appearance of active trading or a false and misleading appearance with respect to the market for the stock in question or a component of a larger scheme for that purpose.

The evidence is undisputed from the opinion of the Court of Civil Appeals and the testimony of the witnesses in the course of their testimony in trial court, that the Securities Exchange Commission had investigated the trading in Jerome Richards & Co., Inc. stock prior to the consummation of the transaction herein by Petitioner and Respondent (S.F. 68, 69, 158, 159). It is also undisputed that the Securities Exchange Commission subsequently obtained an injunction in a United States District Court enjoining Kamen & Company and others from dealing in the stock (C.C.A. Opinion, p. 2, S.F. 67, 68) (Appendix B, p. 4). While it is not apparent from the record that Jerome Richards & Co. Inc. stock is a registered stock or a listed stock, the Securities Exchange Act of 1934 declares that certain manipulative practices are unlawful for the purpose of creating a false or misleading appearance of active trading in any security registered on a national exchange or a false or misleading appearance with respect to the market for any such security. (Appendix A at page 1). The Securities Exchange Act of 1934 (15 U.S.C.A. 78j) further declares that certain manipulative practices are unlawful with respect to securities, whether they be registered or not. (Appendix A hereto at pages 1-2) The Commission's Rule 10b-5 (17 C.F.R. 240:10-b) was intended to implement Section 78j of the Securities Act of 1934. (Appendix A at page 2).

In the case of U. S. v. Morgan, D.C. N.Y. 1953, 118 F. Supp. 621, the Court stated that that section of the Securities Exchange Act of 1934 relating to the purchase and/or sale of a registered or listed security in order to stabilize

the price was intended to apply in the same manner to an unregistered security as dealt with in 15 U.S.C.A. 78j of the Securities Exchange Act of 1934. It should be noted that so-called "matched orders" provision is more fully described in Section 78i than in Section 78j. It seems clear, however, from the Morgan case that the same standard would apply to both registered and unregistered securities.

The opinion of the Texas Court of Civil Appeals states: "This activity indicates Kamen & Company had an active interest in the distribution of Jerome Richard & Co. Inc. stock but in the absence of evidence Kamen & Company intended and purposed to manipulate the market in a prohibited way, this proof of that brokerage house's enterprise, standing alone or in connection with any other facts developed in the record, does not lead to the single conclusion that Kamen & Company and the brokers it used singly or collectively engaged in a prohibited or fraudulent market activity". (Appendix B, page 9). The Court of Civil Appeals either ignored or failed to consider the undisputed evidence with regard to the investigation of Kamen & Company by the Securities Exchange Commission, the District Court action, its subsequent injunction, and the fact that Petitioner's buyer was fictitious or nonexistent.

The Securities Exchange Act of 1934, Section 29(b) provides a civil remedy for the parties to a contract without regard to any injunctive relief which might be sought by the Commission (Appendix A, pages 2-3). The very practice which was being directed by Kamen & Company with Petitioner and Respondent conforms exactly with those manipu-

lative practices proscribed in Section 78i, 78j and Commission Rule 10b-5 of the Securities Act of 1934. The action in the Federal District Court corroborates the fraudulent nature of the activity and it is not significant that Petitioner and Respondent were not parties to the Federal District Court action. Such activity is unlawful regardless of the intent of the parties at its inception.

It seems clear that the language of Section 29(b) of the Securities Act of 1934 provides a sufficient ground for rescission, but also for money damages. (Geismar v. Bond & Goodwin, Inc., 40 F. Supp. 876). The cited case concerned the sufficiency of the complaint to bring a cause of action within the provisions of the Securities Exchange Act of 1934 and therefore subject to Section 29(b) declaring such contracts void. While a violation of a different section of the Act is alleged than in the instant case, it is unequivocably stated that Section 29(b) allows rescission or other appropriate action. This Petitioner therefore is entitled to relief either by way of defense or by way of a declaratory judgment that the contract is void.

The law of Texas as to the enforcement of an illegal contract is well stated by the Supreme Court of Texas in *Morrison v. City of Fort Worth (1941)* 155 S.W. 2d 908, 909, where the Court wrote:

"We think further that it is the settled law in this State that our courts will neither aid in the enforcement of an illegal executory contract, nor relieve from an illegal contract a party who has executed it. (Authorities). These

authorities could be multiplied several times, but we think they are sufficient to establish the correctness of the rule we have announced.". In Ferguson v. Mounts, 281 S.W. 616, 621, the rule is stated thus:

"When the performance of a contract otherwise legal will involve the violation of a statute or positive rule of law, it is not enforceable and cannot be ratified, nor its terms made binding by ratification, waiver or otherwise. *Rue v. Missouri Pacific Ry. Co.*, 88 S.W. 533, 74 Tex. 474, *Raywood Rice, C & M Co. v. Erp*, 146 S.W. 155, 105 Tex. 161, *Chimene v. Pennington*, 79 S.W. 63, 34 Tex. Civ. App. 424."

In Houston Fire & Casualty Insurance Co. v. Pritchard & Abbott, 283 S.W. 2d 728, the Court wrote:

"An action to rescind is not the only legal means of being relieved of the obligation of a contract made under a mistake of fact; relief may also be obtained by defending against an asserted liabilty on the contract."

The United States Circuit Court of Appeals in Chas. Hughes & Co. v. Securities Exchange Commission (139 Fed. 2d 434, Certiorari Denied, 321 U.S. 786) wrote:

"The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other * * *. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception. Federal Trade Commission v. Standard Education Society, 302 U.S. 112, 116 * * *. Indeed it is the purpose of

all legislation for prevention of fraud in the sale of securities to preclude the sale of "securities which are in fact worthless, or worth substantially less than the asking price."

In addition, the Securities Exchange Act of 1934, Section 29 provides that all contracts entered into in violation of any provisions of that chapter or of any rule or regulation thereunder shall be void as regards the right of any person who engaged in the performance of any such contract and as regards the rights of any party, even though not a party to such contract, who shall have acquired any right acquired thereunder with actual knowledge of such facts. For Petitioner to have consummated the purchase of the stock in the light of knowledge as to its illegality would have fostered the scheme and manipulative devices which the law has condemned. For the courts below to have compelled performance under the facts was a substantial deprivation of petitioner's property without due process of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Caption omitted)

APPENDIX "A"

15 U.S.C.A. 78i reads as follows:

"78i. Manipulation of securities prices

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means of instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange - - -

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security,

(A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or

(B) to enter an order or orders for the purchase of such security with the knowledge than an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or

(C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties."

15 U.S.C.A. 78j reads as follows:

"78j Manipulative and deceptive devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange - - -

(a) * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national

securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

17 C.F.R. 240:10-b-5 reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

15 U.S.C. 78cc reads as follows:

"Validity of contracts

(a) Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of exchange required thereby shall be void.

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuation of any relationship or practice in violation of any provision of this chapter or any rule or reg-

ulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation: * * *"

PROOF OF SERVICE

I, WILLIAM F. BILLINGS, Attorney for Southern Brokerage Company, Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of March, 1967, I served a copy of the foregoing Petition for Writ of Certiorari on H. Sam Davis, Jr., 1511 Fidelity Union Life Building, Dallas, Texas 75201, attorney for Respondent, by mailing a copy in a duly addressed envelope, with first class postage prepaid.

.....

William F. Billings

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APPENDIX "B"

COURT OF CIVIL APPEALS
Sixth District
Texarkana, Texas

No. 7707

SOUTHERN BROKERAGE COMPANY,

Appellant,

v.

DAVID CANNARSA,

Appellee.

Appeal from the District Court of Dallas County, Texas.

This is a suit to recover damages for a breach of contract. Judgment entered at the conclusion of a jury trial awarded the appellee here, the plaintiff in the trial court, $7600.00 damages, attorney fees, interest, etc. The defendant below, appellant here, has perfected an appeal. The judgment of the trial court is affirmed.

David Cannarsa, a resident of Muskogee, Oklahoma, as plaintiff, instituted this suit in a District Court of Dallas County, against the defendant, Southern Brokerage Company, a corporation. Both parties are brokers and dealers in stocks and securities. Cannarsa deals principally in mutual funds, while Southern Brokerage Company's main business is in over-the-counter stocks. Both parties do some trading in securities registered (listed) on the New York and other national stock exchanges. Trading at the New York Stock Exchange is an exclusive privilege of membership. Members alone may execute orders on listed stock. Commissions for execution of orders are paid only to members. As a consequence, if a customer of Cannarsa or of

Southern Brokerage Company desired to buy or sell a listed stock either broker would send the order to a member of the Exchange for execution and the Exchange member would would receive the entire commission. To promote their securities business these two brokers separately and independently entered into an arrangement with Kamen & Company, a member of the New York Stock Exchange, to channel orders for listed stock to Kamen & Company. In turn, that brokerage house referred deals involving unlisted stock to each of the brokers as opportunity arose. In each instance the broker executing the order received full commission on the deal.

> "During the year, 1963, certain employees of Kamen & Company, a member of the New York Stock Exchange, conceived and put into operation a scheme for 'rigging' or 'kiting' the stock of Jerome Richards & Co. Inc by using unsuspecting independent brokers around the country to buy and sell said stock in accordance with specific instructions issued from Kamen & Company. On or about the 10th day of July, 1963, Plaintiff-Appellee, David Cannarsa, received instructions from Kamen & Company to buy 700 shares of Jerome Richards & Co. Inc. stock, as principal, from Frederick Cirlin Associates of New York City at $18.875 per share, a total cost of $13,212.50; simultaneously, Cannarsa was instructed by Kamen & Company to sell 300 of such shares to Gerald Young & Company of Springfield, Massachusetts, and the remaining 400 shares to Southern Brokerage Company at a price of $19.00 per share for a "total sales price of $13,300. Cannarsa was to receive no commission for the sales but was to retain the difference between his cost and the sales price, $87.50, for services rendered. The value of the stock to be sold to Appellant, by Cannarsa under instructions received from Kamen & Company, was $7,600.00.

"On the same day, July 10, 1963, Defendant-Appellant received instructions from Kamen & Company to buy 400 shares of Jerome Richards & Co. Inc. Stock from Plaintiff-Appellee Cannarsa, at $19.00 per share, and to sell the same to Rybyl & Company Incorporated of Cheyenne, Wyoming, at $19.125 a share, retaining the difference between cost and sales price, $50.00, for services rendered.

"On July 10, 1963, Appellant, acting on Kamen & Company's instructions, sent to Appellee, Cannarsa a written confirmation of the purchase of 400 shares of Jerome Richards & Co. Inc. stock at $19.00 per share, the settlement date being stipulated therein as July 16, 1963. Cannarsa failed to confirm the sale until some time after the 10th of July when he sent Appellant a confirmation fixing the settlement date as of July 17, 1963.

"On July 22nd or 23rd, 1963, the parties hereto learned from Representatives of the Securities Exchange Commission that an investigation was being conducted as to transactions in Jerome Richards & Co. Inc. stock, to determine if the stock was being 'rigged'. With this knowledge Appellee, Cannarsa, on July 26, 1963, consummated his purchase of 400 shares of Jerome Richards & Co. Inc. stock, from Frederick Cirlin Associates of New York City, pursuant to Kamen & Company's instructions of July 10, 1963.

"After Appellant learned from SEC representatives, that transactions in Jerome Richards & Co. Inc. stock were under investigation, it made inquiry concerning Rybyl & Company Incorporated of Cheyenne, Wyoming, to which it was to sell the stock to be delivered to Appellant by Appellee.

"On July 29, 1963, prior to any attempted delivery of stock to Appellant by Appellee, Appellant called Appellee, telling him that the deal was crooked and that he would not accept delivery of the stock contracted for, or honor a draft for the purchase price thereof. * * *

> Appellee drafted Appellant for $7,600 on at least three occasions, all of which drafts were refused by Appellant. Appellant by his investigation had discovered that his supposed buyer of the Jerome Richards & Co. Inc. stock, Rybyl Incorporated, of Cheyenne, Wyoming, did not exist, prior to his alerting the Appellee * * *.
>
> "That, on August 5, 1963, with the knowledge of both parties, hereto, the Securities Exchange Commission filed an action in the United States District Court, Southern District of New York, seeking an injunction against, among others, Kamen & Company, * * *.
>
> "That to the knowledge of the parties hereto the United States District Court on September 11, 1963, issued an injunction * * *."

Excepting the author's conclusions about Kamen & Company "rigging" and "kiting" Jerome, Richards & Company stock, which has no support in the evidence, the foregoing slightly edited statement abstracted from appellant's brief expresses from the appellant's viewpoint the essential facts and is adopted as an accurate statement of the facts recited. Other facts will be stated when necessary. The central redout of the appellant's defense in the trial court and its position here is that the uncontradicted evidence proves as a matter of law the transaction between Southern Brokerage Company and Cannarsa is an illegal contract made as a part of and in furtherance of a scheme by Kamen & Company to rig the price of Jerome, Richard & Co. stock in violation of the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78a, et seq., and Rule 10b-5 of the Rules and Regulations of the Securities and Exchange Commission, 17 C.F.R. § 240.19b-5, and as such is invalidated by subsection (b) of 15 U.S.C.A. § 78cc.

For appellant's contention to prevail the evidence must be such that reasonable minds can reach no other conclusion. 1 Tex. Law of Evidence (McCormick & Ray) p. 8 § 4. And conversely if a different conclusion might be reached by reasonable minds appellant's defensive position fails as the jury answered all submitted special issues favorably to the judgment rendered and the trial judge presumptively did the same on any submissible issue of act that the parties allowed to be decided without submission to the jury.

The appellant's brief asserts that Kamen & Company's instructions of July 10, 1963, to Cannarsa to buy and sell 700 shares of Jerome, Richard & Company stock and Cannarsa's execution of the instructions constituted a "matched order" manipulation of security prices prohibited by the following provision of subsection (a) (1) of 15 U.S.C.A. § 78i, to-wit:

> "78i. Manipulation of security prices
>
> (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange - -
>
> (1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge than an order or orders of substantially the same size, at substantially the same time, and at substantially the

same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge than an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

* * *"

And that the July 10 transaction in Jerome, Richard & Co. stock was a manipulative and deceptive device condemned by subsection (b) of 15 U.S.C.A. § 78j, and prohibited by Commission Rule 10b-5, both as follows, to-wit:

"78j. Manipulative and deceptive devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities erchange —

"(a) * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

17 C.F.R. § 240:10b-5.

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate commerce, or of the mails, or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud.

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security."

Securities registered or listed on a national securities exchange are the subject of 15 U.S.C.A. 78i. See U. S. v. Morgan (D.C. N.Y. 1953) 118 Fed. Supp. 621 at 695-96. The manipulations prohibited in this section are with respect to registered stock. The record presented to this court does not show Jerome, Richard & Co. stock to be registered or listed on a national exchange. The transaction of July 10, 1963, in the unlisted Jerome, Richard & Co. stock is not shown to be in violation of the provisions of 15 U.S.C.A. § 78i previously quoted.

Both registered and unregistered securities are the subject of 15 U.S.C.A. 78j. See U. S. v. Morgan (D.C. N.Y. 1953) 118 Fed. Supp. 621 at 695-96. This section is applicable to the July 10, 1963, Jerome, Richard & Co. stock transaction previously described. The execution of "matched orders" prohibited by the provisions of 15 U.S.C.A. 78i quoted above, if done for the purpose of creating a false and misleading appearance of active trading or a false and misleading appearance with respect to the market for Jerome, Richard & Co. stock or for any fraudulent purpose would constitute a manipulative and deceptive device prohibited by 15 U.S.C.A. § 78j and Commission Rule 10b-5. The evidence

introduced has been examined carefully, and no proof can be found that the transaction in Jerome, Richard & Co. stock of July 10, 1963, directed by Kamen & Company and executed by Cannarsa was fraudulent or for the purpose of creating a false and misleading appearance of active trading in the stock or a false or misleading appearance with respect to the market for such securities; nor, as later to be discussed, was it a component of a larger scheme for that purpose.

The only evidence in the record bearing upon the purposes of the brokers involved is that Kamen & Company referred the July 10, 1963, trade to Cannarsa pursuant to the business promotion plan mentioned earlier, and Cannarsa, in good faith, bought and sold the Jerome, Richard & Co. stock for his own account in order to make a quick profit. The buy-and-sell order placed with Cannarsa and executed by him has the appearance of a "matched order" prohibited by 15 U.S.C.A. § 78i, if given or executed for the purposes prohibited by the statute. The record contains no evidence of a purpose, motive or desire on the part of Kamen & Company or Cannarsa to accomplish the prohibited result. It is of some relevance to point out that "matched orders", that is, buy-and-sell orders of substantially the same size and at substantially the same time and price are not absolutely prohibited by the statute or Commission rule. See U. S. v. Morgan (D.C. N.Y. 1953), 118 Fed. Supp. 621 at 696. The prohibition is against such action when its purpose is to create a false or misleading appearance of active

trading or a false or misleading appearance with respect to the market for a security, or has a fraudulent effect in some other respect.

Beginning in January, 1963, and prior to the July 10, 1963, transaction, Kamen & Company referred eight or nine buy-and-sell deals in Jerome, Richard & Co. stock to Southern Brokerage Company, which were in due course executed by the latter. Kamen & Company guaranteed payment to Southern Brokerage Company in each instance. A fewer number of buy-and-sell orders, in which he bought and sold for his own account, were referred by Kamen & Company to Cannarsa but no payment guaranty given. This activity indicates Kamen & Company had an active interest in the distribution of Jerome, Richard & Co. stock, but in the absence of evidence Kamen & Company intended and purposed to manipulate the market in a prohibited way, this proof of that brokerage house's enterprise, standing alone or in connection with any other facts developed in the record, does not lead to the single conclusion that Kamen & Company and the brokers it used singly or collectively engaged in a prohibited or fraudulent market activity. In this connection the following sentence from appellee's brief is emphasized, to-wit:

> "There may have been rigging, but the record in this case does not disclose it."

There is evidence that both Cannarsa and Southern Brokerage Company were aware of a suit instituted against Kamen & Company by the Security and Exchange Commission in August, 1965, and that an injunction was thereafter

granted prohibiting further trading in Jerome, Richard & Co. shares. Neither the record of Commission suit nor the decree entered was introduced in evidence. This court has nothing before it from which it may determine that this breach of contract action by Cannarsa is a proceeding in violation of an injunction that the witnesses mention in the course of their testimony. The contract between Cannarsa and Southern Brokerage Company antedated the filing of the injunction proceedings by several weeks.

The appellant's points of error and all argument and propositions set out under each of them have been studied carefully, as has the entire record. Nothing presented is found to require a reversal of the trial court's judgment; the points of error are therefore overruled and the judgment affirmed.

T. C. Chadick
Chief Justice

June 14, 1965
Filed June 14, 1966

IN THE SUPREME COURT OF TEXAS

October 12, 1966

No. A-11653

From Dallas County, Sixth District.

SOUTHERN BROKERAGE COMPANY,

v.

DAVID CANNARSA.

Application of petitioner for writ of error to the Court of Civil Appeals for the Sixth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Southern Brokerage Company, and surety, Lawyers Surety Company, pay all costs incurred on this application.

November 9, 1966

No. A-11653

From Dallas County, Sixth District.

SOUTHERN BROKERAGE COMPANY,

v.

DAVID CANNARSA.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 28th day of February, 1967.

/s/ GARSON R. JACKSON

GARSON R. JACKSON, Clerk

By ....., Deputy

SUPREME COURT, U.S.
FILED
APR 1 1967
JOHN F. DAVIS, CLERK

No. 1127

In the

Supreme Court of the United States

JANUARY TERM 1967

SOUTHERN BROKERAGE COMPANY,

Petitioner,

v.

DAVID CANNARSA,

Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent, David Cannarsa, prays that Petition for Writ of Certiorari be denied.

STATEMENT

This suit was instituted by Respondent, David Cannarsa, as plaintiff for breach of contract whereby Respondent agreed to sell Petitioner 400 shares of the common stock of Jerome Richards & Co. for $7600. Respondent fully complied with the contract but Petitioner refused to consummate the pur-

chase. The trial court, based on the jury's verdict, entered judgment that Respondent recover the sum of $7600, the agreed purchase price.

Neither Respondent nor Petitioner were engaged in any illegal scheme or fraud. Neither knew of any such scheme or fraud at any time material to the transaction here involved. The suit for an injunction instituted by the United States, or one of its agencies, to enjoin trading in the Jerome Richards stock was not filed until after the contract between Respondent and Petitioner had been made, performance tendered by Respondent and refused by Petitioner. It was, evidently, still later when the injunction was granted.

There has never been a contention made that Respondent was a party to any illegal or fraudulent transaction. If any illegality be involved, it is that of certain employees of Kamen & Co. although there is no proof thereof in the evidence in this case.

REASONS FOR DENYING WRIT

1. Trial Court's Judgment Does Not Require Violation of Any Injunction.

Petitioner contended below, and here contends, that it would be illegal to render judgment for Cannarsa. The reasons assigned are that such a judgment would involve transfer of 400 shares of Jerome Richards stock in violation of an injunction of some federal court on some date not in the record but now alleged to be September 11, 1963. The terms of that injunction are not known, as Petitioner did not seek to introduce the same into evidence; nor is it known whether

such injunction still is in force, and if so, whether it prohibits the parties hereto from trading in the Jerome Richards stock.

Assuming, however (which Respondent does not concede) that the injunction prohibits these parties from trading in such stock, the existence of the injunction is immaterial. Respondent, as Plaintiff, did not sue to enforce the contract, but sued for his damages by reason of Petitioner's breach thereof.

> "As a general rule, an ordinary breach of contract by one party * * * immediately confers on the injured party, without the necessity of any affirmative action on his part, a right to sue for damages, or a right to rescind the agreement or to seek specific performance thereof. Furthermore, an ordinary breach of contract by one party also results in excusing performance of the agreement by the other party. Thus, no liability will attach to the party not in default if, subsequently to the other's breach, he places himself in a position that makes it impossible for him to perform the agreement." 13 *Tex. Jur.* 2d 567, 568, "Contracts", Sec. 311.

Accord: 17A *CJS* 1007-1008, "Contracts", Sec. 523(1)b; 17 *Am. Jur.* 2d 904, 1008, "Contracts", Secs. 445 and 521.

Consequently, on Respondent's breach of the agreement, Petitioner had his choice of remedies. If he had elected to sue for specific performance, there might be some justification for Petitioner's claim that it will be forced to violate some injunction. Instead, however, Respondent chose to sue for his damages.

Under the foregoing authorities, the right to sue for breach arises immediately upon the breach. On July 10, 1963, a rep-

resentative of Kamen and Company called Cannarsa suggesting he buy 400 shares of Jerome Richards stock from Cirlin Associates at 18⅞ per share and sell the 400 shares to Southern Brokerage at 19 per share (S.F. 82, 82; Defendant's Exhibit 3).* On the same day, July 10, 1963, petitioner's president, Moore, received a call from Kamen and Company suggesting that Petitioner buy 400 shares of Jerome Richards stock from Cannarsa at 19 per share and sell the same to Rybyl, Inc. for 19⅛ (S.F. 18, 19).

On July 10, Petitioner forwarded to Cannarsa a confirmation showing that Southern Brokerage, as principal, bought from Cannarsa 400 shares of Jerome Richards at 19, or a total price of $7600 (S.F. Plaintiff's Exhibit 1). Likewise, Respondent Cannarsa sent a confirmation to Southern Brokerage that Respondent agreed, as principal, on July 10, 1963 to sell to Southern Brokerage 400 shares of Jerome Richards at 19, or a total price of $7600 (S.F. 34-35; 84-85; Plaintiff's Exhibit 2). Petitioner's president testified that the confirmations showed no discrepancy in the trade (S.F. 35). The confirmations establish the contract. The jury found that the contract was made on July 10, 1963 (Special Issue No. 1).

On July 29, 1963, Petitioner's president called Respondent seeking to cancel the trade; at that time, however, Respondent already had forwarded the stock for delivery to Petitioner and, on the same day, Petitioner refused delivery of the stock (S.F. 159; Def. Ex. No. 2; Special Issue No. 5).

* References to the Record are "S.F." for Statement of Facts and "Tr." for Transcript.

Assuming that an injunction against trading in Jerome Richards & Co. stock was granted and that it was granted on September 11, 1963, as now alleged by Petitioner, it is readily apparent that Respondent's cause of action occurred and was completed on July 29, 1963, several weeks before issuance of the injunction and a week prior to the time the suit for an injunction was filed according to Petitioner's allegation. The cause of action for breach was also complete a week prior to any public announcement of any fraud involved in trading the Jerome Richards stock (S.F. 68). In short, the judgment of the trial court does not require consummation of the trade; instead it awards Respondent his damages on a cause of action that was complete before trading in the stock was, or may have been, prohibited.

2. Respondent's Cause of Action Does Not Involve An Illegal Transaction.

Petitioner contends that the contract in question involves certain federal statutes, is therefore an illegal contract and cannot be enforced in any manner by the Courts. For this proposition is cited *Morrison v. City of Fort Worth*, Tex. Sup. Ct. 1941, 155 S.W. 2d 908. In that case, however, the plaintiff was allowed to recover even though an illegal contract was involved, the court saying, at pages 909, 910 (syl. 3, 4):

> "In order to establish her cause of action the plaintiff requires no aid from the illegal contract. Under such a record, the illegal contract constitutes no bar to the plaintiff's cause of action. This is because of the settled rule in this State that, even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff requires no aid from the illegal transaction to establish his case."

Other Texas cases also establish that a cause of action is enforceable if not dependent on an illegal transaction although such transaction may appear incidentally and explain.

Pioneer Mutual Compensation Co. v. Diaz, Tex. Sup. Ct. 1944, 177 S.W. 2d 202;

Redgrave v. Wilkinson, Tex. Civ. App. 1948, 208 S.W. 2d 150, er. ref., n.r.e.;

Norman v. B. V. Christie & Co., Tex. Civ. App. 1962, 363 S.W. 2d 175, er. ref., n.r.e.;

Willard v. Knoblauch, Tex. Civ. App. 1918, 206 S.W. 734.

The foregoing rule is applicable here. Any manipulation of stock in Jerome Richards or any rigging of the prices thereof is not necessary to Cannarsa's case. The contacts with the representatives of Kamen and Company are helpful to explain the case but are entirely incidental. Cannarsa's case rests on the contract between Petitioner and himself for sale and purchase of stock. The existence of the contract, Respondent's compliance therewith, and Petitioner's breach were found by the jury based on the undisputed evidence. Consequently, any illegality that may have existed is incidental and does not preclude Respondent's recovery of damages.

3. There Is No Evidence of Illegality.

Both Respondent and Petitioner are brokers and dealers in stocks and securities (S.F. 3-4, 79). Respondent, Cannarsa, deals mainly in mutual funds while Petitioner deals mostly

in over-the-counter securities or securities not listed on any exchange; both, however, do some trading in stocks listed on the New York and other national stock exchanges; (S.F. 4, 79). Under the rules governing the New York Stock Exchange, a broker who is not a member of the Exchange cannot charge a commission for buying or selling listed stocks. Consequently, if a customer of Petitioner or Respondent desires to buy or sell a listed stock, Petitioner or Respondent sends the trade to a member of the Exchange who executes the transaction and who gets the entire commission (S.F. 4-5).

Addison Moore, Petitioner's president, testified that he first had contact with representatives of Kamen and Company, a New York brokerage firm and a member of the New York Stock Exchange, in April, 1963 (S.F. 3, 7). These representatives suggested that Petitioner refer any trades in listed stocks to Kamen and Company who would get the commission thereon, and Kamen and Company would refer trades in over-the-counter stocks to Petitioner (S.F. 5-7). Thereafter, representatives of Kamen called Petitioner's president and gave him trades in the stock of Jerome Richards & Co., Inc.; in each instance the representative of Kamen and Company would advise Petitioner from whom and at what price the Jerome Richards stock could be bought, and to whom and at what price Petitioner might sell (S.F. 11-13). In a six-month period, from January to July, 1963, Petitioner had eight or nine such transactions in Jerome Richards stock, all suggested by representatives of Kamen and Company (S.F. 10). In each instance, Petitioner and the other party exchanged confirmations and the trade was closed

(S.F. 13). In none of the eight or nine prior trades did Petitioner have any oral or written contract with the other party prior to the exchange of confirmations (S.F. 13).

David Cannarsa, Respondent, testified to similar contact with Kamen and Company, whereby that company offered to give Cannarsa trades in over-the-counter stock in return for Cannarsa's referring transactions in listed securities to Kamen and Company (S.F. 80, 81). In those instances, a representative of Kamen and Company would advise Respondent from whom and at what price to buy, and to whom and at what price to sell (S.F. 81, 82).

Throughout, Petitioner speaks of Cannarsa and Southern Brokerage as acting on "instructions from Kamen and Company." The jury's finding counters this theory. In addition, the undisputed testimony reveals that Petitioner Southern Brokerage Company showed on its confirmation that it acted as principal and not as agent, that all sales proceeds went to Petitioner and Petitioner used its own money to effect the purchases of Jerome Richards stock (S.F. 14-16). No commission was involved and none paid by Kamen and Company (S.F. 158). In addition, Petitioner Southern Brokerage Company received a guarantee from Kamen and Company before taking this trade (S.F. 168-170) and has instituted suit thereon in New York (S.F. 55, 56). Respondent Cannarsa did not receive any guarantee; he used his own money to buy the stock which Petitioner refused to purchase; Cannarsa indicated on the confirmation that he acted as principal, and he received no commission from Kamen and Company and was not employed by Kamen (S.F. 152-153).

Cannarsa never was a party to any rigging or fraud in connection with trading in Jerome Richards stock. He testified that he sincerely believed the stock was all right (S.F. 133). Southern Brokerage never contended that Respondent Cannarsa defrauded it or participated in any fraud practiced by Kamen and Company (S.F. 53). Respondent has never contended that Southern Brokerage was a party to any fraudulent scheme; instead, Respondent and apparently Petitioner, both, were innocent parties caught up in the rigging scheme of Kamen and Company. Petitioner's president summed up the situation of the parties in testifying as to a conversation he had with Cannarsa about the last of July, 1963:

"You and I apparently have been the victims of a very complex scheme or swindle that covers many, many brokers in many states * * *" (S.F. 68).

Since Respondent was found by the jury on undisputed evidence, as pointed out above, to have been acting for himself and not as an agent, there is no question of imputing any knowledge of the fraud to him. The question, then, revolves around when knowledge of the fraud first existed.

Cannarsa testified that two representatives of the S.E.C. called him and asked about this trade in Jerome Richards stock; this conversation occurred probably about the 20th or 21st of July, 1963 (contract was made July 10, 1963). The S.E.C. representatives did not inform Respondent of any fraud or rigging; instead, they advised Cannarsa that they were investigating *possible rigging* of trades in Jerome Richards stock (S.F. 93, 94; 121-134). Respondent, after such call, tried to contract the representatives of Kamen and Company

but was unable to do so (S.F. 121, 122). However, while discussing this trade, Respondent asked the S.E.C. representatives what to do about this deal; these representatives told Cannarsa that they did not see anything wrong with the trade or the way it was handled and told him to go ahead with it (S.F. 123). Upon receiving this advice, he honored the draft and paid for the Jerome Richards stock on July 25, and, the same day, sent the stock with draft attached to Dallas for delivery to Petitioner (S.F. 122-123; 93).

Representatives of S.E.C. called on Moore, Petitioner's president, on July 22, 1963, *investigating* trading in Jerome Richards stock (S.F. 73). Later, on July 29, 1963, Petitioner's president, after learning that the firm which was supposed to buy the 400 shares of Jerome Richards from Petitioner did not exist, called Cannarsa and said that the trade was off because of the fraud or scheme of Kamen and Company. At this time, however, Cannarsa had already forwarded the stock to Dallas; in fact, on the same day, July 29, Petitioner refused delivery of the stock (S.F. 159; Defendant's Exhibit 2; Special Issue No. 5).

The foregoing evidences that there was no knowledge of any fraud or scheme on the part of Cannarsa until after he had tendered the stock to Petitioner. Any information prior to that time was knowledge of an investigation; with this knowledge Cannarsa might not have entered into future transactions, but certainly the mere existence of an investigation does not reveal that illegal conduct occurred or justify termination of an executed agreement, especially where, as here, the investigators advised Respondent to proceed with the sale.

As a matter of fact, it was not until August 5, 1963, that the existence of fraud or a rigging scheme was made public, and only after that date that trading in Jerome Richards stock was prohibited (S.F. 68, 135-6). By that date, Cannarsa had tendered performance and Petitioner had refused to accept.

It ill behooves Petitioner to contend at this late date that Cannarsa and Southern Brokerage were participants in the rigging scheme; at the time of the transaction Petitioner's president clearly and properly placed the blame on Kamen and Company, and likewise properly characterized Cannarsa (and Petitioner, too) as "victims".

As opposed to the foregoing facts, Petitioner cites the statutes and states that there has been a violation thereof. The Court of Civil Appeals held, however, that the mere fact that matched orders are involved does not show a statutory violation. That holding is correct.

> *United States v. Morgan*, D.C.N.Y. 1953, 118 FS 621 (Syl. 10).

Intent is also an essential element to prove statutory violation.

> *United States v. Gasomiser Corp.*, D.C. Del. 1947, 7 FRD 712 (Syl. 6);
>
> *United States v. Minuse*, C.A. 2 1940, 114 F. 2d 37 (Syl. 3).

The evidence referred to above does not make out either element. The fact of the injunction does not make out a case of illegality since the order is not in evidence and there

is no showing that the injunction issued because of fraud and, if there were fraud, who participated therein. There may have been rigging but the record in this case does not disclose it. The record reveals only that some unknown parties were enjoined from trading in Jerome Richards stock, that injunction evidently being granted after Respondent had complied with and Petitioner had breached the contract. Prior to that time, Respondent had no knowledge of any rigging or scheme.

4. Respondent Is Not in Pari Delicto.

Under the facts, Respondent was not aware of any illegality, did not intend to violate any law and did not even have any knowledge thereof until after his cause of action occurred. Respondent was not in pari delicto; consequently the contract may be enforced.

Graham v. Dean, Tex. Sup. Ct. 1945, 188 S.W. 2d 372 (Syl. 2);

Lewis v. Davis, Tex. Sup. Ct. 1947, 199 S.W. 2d 146, (Syl. 15 and 16).

We do not mean to imply that Southern Brokerage was a party to the illegal scheme, nor that it was aware of any facts giving it knowledge of any illegality. Indeed, the testimony reveals that Petitioner's president was aware only of an investigation by the S.E.C. until some time subsequent to full performance of the contract by Cannarsa.

Certainly, then, if the courts will enforce a contract where one of the parties is guilty of illegal conduct, there is no reason why the courts should not enforce a contract where

neither party violated the law, especially when the violation is a collateral matter committed by third parties.

The situation here is similar to that where a party resists enforcement of a contract on the grounds of a fraud perpetrated by some third party. In such instances, the courts have held that the fraud of a third party is no defense to suit on a contract.

> *Wilson v. McLemore*, Tex. Civ. App. 1951, 242 S.W. 2d 791, er. ref., n.r.e., (Syl. 1);
>
> *National Union Fire Ins. Co. v. Peck*, Tex. Civ. App. 1927, 296 S.W. 338, er. dism. (Syl. 3 and 4);
>
> *Guadalupe-Blanco River Authority v. City of San Antonio*, Tex. Sup. Ct. 1947, 200 S.W. 2d 989 (Syl. 6).

Fraud of a third party is no defense. Likewise, illegality of a third party should be no defense.

5. Violation of the Securities Laws Does Not Make the Contract Unenforceable.

Respondent does not admit, but denies, that there was any violation of the Federal Securities Acts. If, however, a violation did occur, the contract is still enforceable. The leading case, involving Securities Act violations, is *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 85 L. Ed. 500 (1940). This court, in holding the contract enforceable although the securities involved had not been registered as required by law, said:

> "The rule that contracts in contravention of public policy are not enforceable came under discussion in Steele v. Drummond, 275 U.S. 199, 72 L. Ed. 238, 48 S. Ct. 53 and Twin City Pipe Line Co. v. Harding Glass

> Co., 283 U.S. 353, 356, 357, 75 L. Ed. 1112, 1115, 1116, 51 S. Ct. 476, 83 A.L.R. 1168; In the latter the opinion declares, the principle 'should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party will be permitted to avoid his own promise.'
>
> "The protean basis underlying this doctrine has often been stated thus—No one can lawfully do that which tends to injure the public or is detrimental to the public good. If it definitely appears that enforcement of a contract will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down."

Similar holdings are:

Wood v. Reznik, C.A. 7, 1957, 248 F. 2d 549;

Fuller v. Dilbert, S.D.N.Y., 1965, 244 F.S. 196.

The foregoing rule is especially applicable here since no public purpose would be served by refusing to permit Respondent's recovery; the only result is to penalize Respondent who performed his contract completely unaware of any illegality.

That a person's lack of knowledge of illegality makes the contract enforceable has been recognized by the S.E.C. In regard to its power to issue stop orders under Sec. 15(c)(5) or Sec. 19(a)(4) of the Securities Exchange Act of 1934 (14 USCA 78o & 78s) the Commission by its release no. 34-7920, July 19, 1966, Reg. 241.792D, stated:

> "A number of questions have been presented recently as to whether, during the period when trading is suspended by order of the Commission pursuant to Section 15(c)(5) or Section 19(a)(4) of the Securities Exchange Act

of 1934, a broker or dealer may complete (e.g. by payment or delivery) an agency or principal contract entered into prior to the suspension.

"It is the position of the division that where the broker or dealer is himself acting in good faith, where he is not connected with the activity announced by the Commission as a basis for suspension * * *, no objection need be raised under such sections because the broker-dealer completes his contractual obligations * * *."

The rule of *Frost and Co. v. Coeur D'Alene Mines Corp.*, supra, and the reasoning contained in the aforesaid S.E.C. release are embodied in the terms of the applicable statute. Section 29(b) of the Securities Exchange Act of 1934, 14 USCA 78cc(b), provides in part:

"Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation * * *".

A reading of the statute reveals that contracts, involving validity of the Securities Exchange Act, are void only as regards to one who violated the statute. In *Bankers Life &*

Casualty Co. v. Bellanca Corp., C.A. 7, 1961, 288 F. 2d 784, cert. den., 368 U.S. 827, the court said:

> "Under the provisions of Sec. 78cc(b) the consequence of a violation is that the contract shall be void 'as regards the rights of any person, who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, * * *'. It is only the *contract rights* of the party in violation which are voided. The party in violation can not enforce his or its rights thereunder. But no rights of the party not in violation are impaired."

In construing the same statute, the court, in *Royal Air Properties, Inc. v. Smith*, C.A. 9, 1962, 312 F. 2d 210, at page 213, said:

> "Although section 29 (b) declares such illegal contracts void as regards the right of any violator, it does not make such contracts void as regards the rights of the innocent party to the contract."

Here, Respondent is an innocent party. He did not violate any statute nor was he aware of any violation at any material time until after he had fully complied with the contract and Petitioner had breached by refusing delivery. Under Sec. 29(b) the contract is enforceable.

CONCLUSION

This is a suit for breach of contract. There is no illegality or statutory violation involved in the contract, nor any culpable conduct by either party thereto. Therefore, no reason is shown as to why it should not be the basis for recovery of damages.

Petitioner contends that the contract is illegal. This contention, however, is sterile of any supporting facts. There

is no showing of misconduct by Respondent, nor of any evil intent on his behalf, both of which are required to prove a violation of the statute. The deficiency in proof is not supplied by a reference to an injunction issued by some federal court at some time after Cannarsa's cause of action arose. The terms of the injunction are not in the record and any findings of that court are based on conjecture.

If there be fraud or statutory violation, it is attributable to third parties. Respondent was not a party to any fraud or rigging scheme and was ignorant of any such fraud or scheme (if any there were) until after the contract had been executed and performance tendered by Respondent. Likewise, Petitioner was not a party to any such scheme and had no knowledge thereof, although its president was sufficiently suspicious to require a guarantee on the trade. Under such circumstances, it is not the law, nor the policy of the law, to declare the contract null and void.

WHEREFORE, Respondent prays that Writ of Certiorari be denied.

BURFORD, RYBURN & FORD,

By Spencer C. Relyea III
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PROOF OF SERVICE

A copy of the Foregoing Reply to Petition for Writ of Certiorari was served on Attorneys for Petitioner this 29th day of March, 1967, by mailing a copy thereof in a properly addressed envelope, first class postage prepaid.

By Spencer C. Relyea III